



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2004

Ms. Ruth Soucy
Manager and Legal Counsel
Open Records Division
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2004-7085

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206486.

The Comptroller of Public Accounts (the "comptroller") received two requests for information pertaining to the Red River Unitarian Universalist Church's (the "church") application for a tax exemption, reference materials governing tax exemptions, and a list of all destroyed documents concerning the church's application. You do not object to the release of the two latter items. Therefore, to the extent they exist, we assume the comptroller has released these items. *See* Gov't Code §§ 552.301, .302. The comptroller asserts the submitted information is excepted from required public disclosure by sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from Karl Weston, one of the requestors. *See* Gov't Code § 552.304.

First, we note that some of the submitted e-mails are not responsive to the requests because they were created after the comptroller's receipt of the two requests. Thus, the comptroller need not disclose them. We have marked such e-mails.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply

to which parts of the documents. Gov't Code § 552.301(e)(4). Both requests ask for information in the comptroller's files pertaining to the church's application for a tax exemption. The comptroller received the first request on May 19, 2004. The comptroller submitted e-mails responsive to the requests on July 22, 2004. Consequently, the comptroller failed to comply with section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The comptroller asserts the e-mails are excepted from public disclosure under sections 552.107 and 552.111. These exceptions are discretionary exceptions and do not make information confidential. *See* Open Records Decision Nos. 630 (1994) (section 552.107 is a discretionary exception), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Thus, the comptroller must release the e-mails that are responsive to the request.

Next, we address the comptroller's arguments against public disclosure for the rest of the information. The comptroller has released the taxability ruling but has withheld the taxpayer's identifying information pursuant to Open Records Letter No. 96-1612 (1996). Open Records Letter No. 96-1612 addressed section 552.025 of the Government Code, which reads as follows:

- (a) A governmental body with taxing authority that issues a written determination letter, technical advice memorandum, or ruling that concerns a tax matter shall index the letter, memorandum, or ruling by subject matter.
- (b) On request, the governmental body shall make the index prepared under Subsection (a) and the document itself available to the public, subject to the provisions of this chapter.
- (c) Subchapter C does not authorize withholding from the public or limiting the availability to the public of a written determination letter, technical advice memorandum, or ruling that concerns a tax matter and that is issued by a governmental body with taxing authority.

Gov't Code § 552.025. Subsection (c) states that a governmental body with taxing authority that issues rulings covered by section 552.025 shall make such rulings available to the public and that subchapter C of the Public Information Act (the "Act"), the chapter containing all of the exceptions to required public disclosure, does not authorize withholding such rulings from public disclosure. *See* Gov't Code § 552.025(b), (c). The comptroller is a governmental body with taxing authority. *See* Tax Code title 2.

In Open Records Letter No. 96-1612, this office concluded subsection (c) derives from now-repealed article 6252-17a, section 6A of the Texas Revised Civil Statutes, and that the legislature intended the codification of article 6252-17a to be nonsubstantive. *See* Act of May 22, 1993, 73rd Leg., R.S., ch. 268, § 47, 1993 Tex. Gen. Laws 986. Subsection (c) differs from its predecessor provision in that the predecessor statute provided a taxability ruling is subject to the Act's exceptions. Act of June 16, 1991, 72nd Leg., R.S., ch. 705, § 41, 1991 Tex. Gen. Laws 2530, *repealed by* Act of May 22, 1993, 73rd Leg., R.S., ch. 268, § 46, 1993 Tex. Gen. Laws 986. In order to conform with the legislature's intent that the codification be nonsubstantive, Open Records Letter No. 96-1612 construed section 552.025(c) to mean that a taxing authority may withhold tax rulings from public disclosure based on an exception in the Act. The prior decision then concluded that the comptroller must withhold portions of the tax rulings under section 552.101 of the Act.

However, the supreme court has overruled the rationale of Open Records Letter No. 96-1612. The supreme court addressed this very issue in *Fleming Foods of Texas v. Rylander*, 6 S.W.3d 278 (Tex. 1999). In *Fleming Foods*, despite the legislature's directive to the Legislative Council to recodify the Tax Code without any substantive change in the law, the changes in the Tax Code provisions at issue did result in substantive changes to the prior law. The court held that "when, . . . , specific provisions of a 'nonsubstantive' codification and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification rather than the prior, repealed statute must be given effect." *Id.* at 286. The court further held that "[g]eneral statements of the Legislature's intent cannot revive repealed statutes or override the clear meaning of a new, more specific statute." *Id.*

Here, section 552.025(c) is a substantive change from the prior law contrary to the legislature's stated intent. The express terms of section 552.025(c) are clear and unambiguous. Thus, this office must give effect to the current law. *Id.* at 284 (when "nonsubstantive" codified provisions change prior law, the unambiguous provisions are current law, and their words as written must be given effect unless there is an obvious error such as a typographical error or application of the plain language would produce an absurd result). Accordingly, the comptroller may not rely on the Act's exceptions and must release the taxability ruling in its entirety.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 111.006(a)(2) of the Tax Code provides that information "secured, derived, or obtained by

the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer" is confidential. Tax Code § 111.006(a)(2).

Mr. Weston argues section 111.006 does not apply here because the church is not a taxpayer. Mr. Weston contends the church's request for an exemption requires a determination as to whether the church would become a taxpayer. A "taxpayer" is defined as "the person whose tax obligation the comptroller is seeking to determine." *Id.* § 111.0043. Thus, the church is a taxpayer for purposes of section 111.006, and this section is applicable to the comptroller's consideration of the church's application for a tax exemption.

The supreme court considered the applicability of section 111.006 to several categories of information in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In doing so, the court not only considered if the information was derived from the taxpayer's records, but also whether the information reveals anything about the taxpayer's business affairs, operations, financial condition, profits, or losses. *Id.* at 676, 680. The court concluded that the starting and ending dates of an audit are not confidential under section 111.006 because although they may indicate the seriousness of an audit, they "reveal[] nothing about a taxpayer's business affairs, operations, or profits or losses." *Id.* at 676. Similarly, the court concluded that while the amounts of deficiencies or refunds are derived from the taxpayer's records, the fact of a deficiency or refund "reveals nothing about taxpayers except that they miscalculated their tax." *Id.* at 680; *see id.* at 680 n. 6. Thus, the fact of a deficiency or refund is not confidential under section 111.006.

Based on *A & T Consultants*, we have marked the information that is confidential under section 111.006 because it is obtained from the taxpayer and reveals the taxpayer's business affairs, operations, financial condition, profits, or losses. Accordingly, the comptroller must withhold such information pursuant to section 111.006(a)(2) of the Tax Code. The comptroller must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

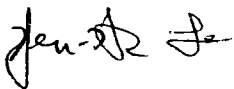
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Yen-Ha Le', with a stylized flourish at the end.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 206486

Enc: Marked documents

cc: Mr. Karl W. Weston
Law Office of Karl W. Weston
P.O. Box 131991
Houston, Texas 77219
(w/o enclosures)

Mr. Bobby Ross
The Associated Press
4851 LBJ Freeway, Suite 300
Dallas, Texas 75244
(w/o enclosures)